33838 (1)

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

FILED

2007 MAY 21 P 3:21

ADELL CHANDLER
CIRCUIT CLERK
CABELL WV

O.J. MAYO,
Plaintiff

v.

Civil Action No. 07-C-76
Chief Judge Dan O'Hanlon

THE WEST VIRGINIA SECONDARY SCHOOLS ACTIVITIES COMMISSION,
Defendant

AMENDED ORDER

This matter came before this court on January 30, 2007, when the Plaintiff filed his Motion seeking injunctive relief. Whereupon, on January 30, 2007, the Court ordered that the Plaintiff shall remain eligible to participate in interscholastic activities until further order of the Court and until this matter could be fully heard. The Court set the matter for hearing on February 9, 2007. On February 9, 2007, the Plaintiff and the Defendant (hereinafter "WVSSAC"), by their attorneys and pursuant to the previous order, and jointly announced to the Court that the parties had reached an agreement. The Court listed the findings of the agreement in its prior Order entered April 5, 2007. The Court also found that Rule 127-3-8.5 is unconstitutional, except in the instance where a Court finds that the injunction sought was unjustified. On April 17, 2007, the WVSSAC, through its counsel, filed a Motion to Alter or Amend Judgment, seeking the Court to find: (1) that the WVSSAC is an not an administrative agency of the state; (2) that the members of the WVSSAC are not officials and employees of a state agency; (3) that WVSSAC Rule 127-3-8.5 is not unconstitutional; (4) that

there is no case or controversy involving the constitutionality of WVSSAC Rule 127-3-8; and (5) that an award to the Plaintiff of his attorney fees and costs is not warranted under the facts and circumstances of this case.

On May 7, 2007, the Plaintiff filed a response to WVSSAC's Motion to Alter or Amend Judgment. In addition, the Plaintiff sought to have additional findings added to the Court's earlier order. The Court set the matter for hearing on May 9, 2007.

WHEREUPON, the Court has considered the Motion to Alter or Amend Judgment, the Plaintiff's responses and requests, and the supporting memoranda of law, the parties' arguments at the hearing, and has reviewed all pertinent legal authorities. As a result of these deliberations, and for the reasons stated below, the Court has concluded that the Order shall be amended as follows:

1. Plaintiff was ejected from an interscholastic athletic contest as a result of receiving two technical fouls. The rules of the WVSSAC require that a student athlete ejected from an interscholastic basketball contest for receiving two technical fouls be suspended for two additional games. Title 127, C.S.R., § 127-4-3.7.3 (hereinafter the legislative rules of the Defendant WVSSAC will be referred to as "Rule(s)"). By order entered on January 30, 2007, this Court issued an injunction prohibiting the enforcement of the suspension for two additional games.

2. The Plaintiff was also allegedly subject to disciplinary action for allegedly "laying hands" on a referee officiating an interscholastic basketball contest in which Plaintiff was competing in violation of rules. Rule 127-4-3.7.2. Plaintiff denied that he had violated the spirit or the letter of Rule 127-4-3.7.2. While either the school or the WVSSAC can impose sanctions, in this instance Huntington High School initially imposed a 14-day suspension from participating in any athletic contest, which would have resulted in Plaintiff being suspended for four games. The WVSSAC advised all parties that, in light of the action of Huntington High School, it would take no action regarding Plaintiff's alleged contact with an official in violation of Rule 127-4-3.7.2.

3. Prior to the hearing on February 9, 2007, to wit: on February 5, February 6, and February 8, 2007, counsel for Plaintiff was advised that if the injunction was voluntarily vacated by agreement between Plaintiff and the WVSSAC, the two-game suspension stemming from Plaintiff having been ejected for receiving two technical fouls would be served concurrently with the suspension imposed by Huntington High School.

4. During discussions outside of the presence of the Court at a recess of this hearing, Huntington High School agreed to modify its suspension from 14 days to 13 days, the practical effect of which is that Plaintiff would be suspended from three rather than four

basketball games. The Defendant WVSSAC advised all parties that it would stand by its earlier decision to defer to Huntington High School on the question of alleged violation of Rule 127-4-3.7.2.

5. The two-game suspension resulting from a basketball player being ejected for receiving two technical fouls during a game is a portion of the sanction resulting from the decision of the game officials to assess two technical fouls. A review of the suspension would necessarily involve a review of the decision of the referee to assess a technical foul.

6. An administrative agency has a duty to promulgate reasonable rules and regulations. With respect to legislative rules, the Supreme Court has held, "[i]t is fundamental law that the Legislature may delegate to an administrative agency the power to make rules and regulations to implement the statute under which the agency functions. In exercising that power, however, an administrative agency may not issue a regulation that is inconsistent with, or which alters or limits its statutory authority." Rowe v. W. Va. Department of Corrections, 170 W.Va. 230, 292 S.E.2d 650 (1982)(Syllabus Point 3).

7. West Virginia Code Section 18-2-25 provides that "[t]he rules and regulations of the West Virginia secondary school activities commission shall contain a provision for a proper review procedure and review board and be promulgated in accordance with the

provisions of chapter twenty-nine-a [§§ 29A-1-1, et seq.] of this Code. . . ." Additionally, the court notes that the Legislature empowered the WVSSAC to exercise "control, supervision and regulation of interscholastic events" and to promulgate "reasonable rules and regulations." Id. Primary to exercising such authority over "athletic events" is determining who is eligible to participate in such events, as the WVSSAC has done in the legislative rule at issue in this case.

8. Analysis of the rules of the WVSSAC must turn to whether the legislative rule in question is arbitrary and capricious. Jones v. W.Va. Board of Education, 218 W.Va. 52, 622 S.E.2d 289 (2005).

9. Current WVSSAC regulations prevent any form of protest or appeal to reconsider a two-game suspension, as was assessed against the Plaintiff, regardless of the merits of the same. Rule 127-4-3.7.3 provides in pertinent part that "[a]ny . . . student . . .ejected by an official will be suspended for the remainder of the game . . . . He will also face suspension in additional contest(s) . . . assessed based upon ten (10) percent of the allowed regular season contests for each sport."

10. Rule 127-3-15.3 provides that a "protest of a contest or ejection will not be allowed."

11. Rule 127-4-3.10 provides that "[a]ll cases involving disciplinary action against . . . . students may be protested in accordance with §

127-6." Rule 127-6-5 provides that "[c]ommencement of an appeal in a contested case by an aggrieved party . . . . shall be instituted by the filing of a verified petition. . . ." Rule 127-6-5.6 provides for the right of a hearing on the appeal with notice of at least seven days in advance of the time set for hearing.

12. Plaintiff asserts that he violated neither the letter nor the spirit of the "two technical fouls in one contest" rule requiring ejection and requested an opportunity to be heard on the matter before enforcement of any disciplinary action. Plaintiff asserts his request was summarily denied by Executive Secretary Hayden of the WVSSAC.

13. The WVSSAC denied Plaintiff an opportunity to be heard and denied Plaintiff fundamental fairness.

14. Rule 127-3-15.3 is inequitable and violates the doctrine of fundamental fairness. The failure of the WVSSAC to establish an appeal process available before enforcement of the punishment is clearly wrong. The current regulations are repugnant to any notion of due process. Balancing the mandatory, unreviewable sanction of a multiple-contest suspension against the limited resources necessary to ensure equity and an opportunity for a student-athlete to be heard results in this Court's finding that the appeal process is indeed lacking in fundamental fairness.

15. The Court finds that the WVSSAC's failure to establish an administrative review process to address material, substantive issues prior to imposition of a multiple-game suspension is arbitrary and capricious, and accordingly, held null and void and is hereby struck down.

16. Although not mentioned in Plaintiff's Complaint, the Court expressed deep concern about the possibility of Huntington High School being required under Rule 127-3-8 to forfeit basketball games in which the Plaintiff participated in pursuant to the injunction. The Defendant WVSSAC announced that, while there is a rule found at Title 127, C.S.R. § 127-3-8 which vests the WVSSAC with the discretion to forfeit contests in which a student participates who is later found ineligible or who is subject to a penalty, in the interest of fairness, this forfeiture rule would not be invoked by the WVSSAC in this case if Plaintiff participates pursuant to an injunction.

17. The Court finds the promise of the WVSSAC through its counsel not to invoke the forfeiture rule in Plaintiff's case insufficient to quell the Court's concerns about the forfeiture rule in general. One of the grand features of West Virginia jurisprudence, unlike the federal system, is the Constitutional mandate (Section 17 of Article III) that the courts shall be open to anyone to seek a remedy by due course of law.

18. The threat of forfeiture of contests in cases where the aggrieved parties seek remedy in the courts has a "chilling effect" on the constitutional mandate that the courts shall be open to anyone to seek a remedy by due course of law. Although this Plaintiff has secured the agreement of the WVSSAC not to forfeit the contests in which he participated pursuant to the injunction, there is no prohibition against the WVSSAC demanding the forfeiture of contests participated in by the next aggrieved party who seeks his right to a remedy in due course of law in the courts. The final straw for this rule is that the legislative rule in question is arbitrary and capricious. Jones v. W.Va. Board of Education, 218 W.Va. 52, 622 S.E.2d 289 (2005).

19. Rule 127-3-8.5 provides in pertinent part that "[i]f a student is ineligible according to WVSSAC rules but is permitted to participate in interscholastic competition contrary to such WVSSAC rules but in accordance with the terms of a court restraining order or injunction and said order or injunction is subsequently vacated, stayed, reversed or finally determined by the courts that injunctive relief is/was not justified, any one of the following actions may be taken in the interest of fairness or restitution to the competing schools.

8.5.1 Require that individual or team and performance records achieved during participation by such ineligible student shall be vacated or stricken.

8.5.2 Require that team or individual victories shall be forfeited to opponent(s).

8.5.3 Require that team or individual awards earned by such individual or team be returned to the Commission."

20. Normally, an order such as this one would be vacated following the completion of the game(s) or season in which the player participated pursuant to an order or injunction. Merely on the basis of the vacation of the order, even if completely justified in its entry, the WVSSAC could forfeit contests in which the player participated. The failure to consider the basis for the entry of the order and its subsequent dismissal or vacation, etc., causes the rule to be arbitrary and capricious.

21. Therefore, Rule 127-3-8.5 is struck down as unconstitutional except as it applies to restraining orders or injunctions that are specifically found by a court not to have been justified. The WVSSAC is hereby limited to applying the forfeiture rule only to those instances where a court makes a specific finding in a final determination that the restraining order or injunction was not justified. This limitation of the forfeiture rule is sufficient to protect the best interests of the parties and to protect the fairness or restitution to the competing schools.

22. Courts do not generally pass on constitutionality of challenged statutes except where necessary to the decision of the case. Norris

v. Cabell County Court, 163 S.E. 418, 111 W.Va. 692 (1932). Striking down Rule 127-3-8.5 is necessary to the decision of the case because of the potential chilling effect it has upon future aggrieved parties.

23. In general, where the issue in dispute is resolved through agreement, the proceeding should be dismissed as moot. However, the challenged action of a game suspension is too short in duration to be fully litigated prior to its cessation or expiration. It is reasonable to assume that similarly situated parties as the Plaintiff here all face the threat of forfeiture of contests in which they compete pursuant to their remedy sought in court.

24. Three factors to be considered in deciding whether to address technically moot issues are as follows: (1) the court will determine whether sufficient collateral consequences will result from determination of the questions presented so as to justify relief; (2) while technically moot in the immediate context, questions of great public interest may nevertheless be addressed for the future guidance of the bar and of the public; and (3) issues which may be repeatedly presented to the trial court, yet escape review at the appellate level because of their fleeting and determinate nature, may appropriately be decided. Gallery v. West Virginia Secondary Schools Activities Commission, 205 W.Va. 364, 518 S.E.2d 368 (1999); Israel by Israel v. West Virginia Secondary Schools

Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989); State ex rel. M.C.H. v. Kinder, 173 W.Va. 387, 317 S.E.2d 150 (1984).

25. Examining the first of these three factors as they apply to the instant case, the Court finds that there would be some degree of collateral consequences from declining to assess the validity of the WVSSAC's forfeiture rule. The rules at issue in this matter apply to literally thousands of students and to all member schools. Determining the propriety of a rule that could potentially affect many thousands of students shows that the collateral consequences here are high. Israel by Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989);

26. Looking to the second factor, the Court finds that the scope of the public interest involved in the issues that were before the Court is large. The forfeiture rule could be applied in any instance in which an aggrieved party, be it student or school, seeks a remedy in the courts, which, because of the nature of the case, is vacated or expires before being fully litigated. Secondary school activities such as basketball involve a most vital public function—education of our youth.

27. As to the third factor, the Court finds that the issue of the threat of application of the forfeiture rule is so fleeting that it will inherently and necessarily escape review if presented in a subsequent case.

The basketball season is only a portion of the school year, and it is quite unlikely that a case could be fully litigated before becoming "moot." That the issue is capable of repetition is self-evident.

28. Therefore, since it is foreseeable that the issue of the possible application of the forfeiture rule to other aggrieved parties who seek a remedy in court will arise again, the Court finds that the question remains justiciable for future guidance and it is appropriate for the Court to rule on this issue. Israel by Israel v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 454, 388 S.E.2d 480 (1989).

29. The Court also finds that Plaintiff is entitled to an award of his attorneys' fees and court costs for bringing this action.

30. Defendant WVSSAC is an organization established by West Virginia Code § 18-2-25 as an administrative agency of the state and a participating public employer in the West Virginia Public Employees Retirement System. 58 W. Va. Op. Atty. Gen. 151, 1980 WL 119398 (W.Va.A.G.). The Defendant WVSSAC is a state agency whose funds may be invested in the Consolidated Investment Fund established pursuant to W.V. Code § 12-6-1, et seq. 61 W. Va. Op. Atty. Gen. 72, 1986 WL 288932 (W.Va.A.G.).

31. The Supreme Court of Appeals has also referred to the WVSSAC as a "state" commission. Hamilton v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 158, 386 S.E.2d 656

(1989)(refers to the Commission as "statutorily-created agency of the government").

32. The WVSSAC would like for this Court to find, under the auspices of State ex rel. Manchin v. WVSSAC, that the Defendant is not a state agency or instrumentality of the government. 178 W.Va. 699, 364 S.E.2d 25 (1987). The WVSSAC argues, just as it did in Manchin, that the WVSSAC is a voluntary association of high school principals, not a state agency. The WVSSAC also argues, just as it did in Manchin, that its participation in the public employees' retirement system and in the consolidated investment fund has no bearing on this case because such participation is governed by particular statutory definitions not applicable here. It is important to note that the court in Manchin did not ever conclude that the WVSSAC was not a state agency. It expressly limited its decision to a narrow question of whether the WVSSAC's funds are "moneys due the state" under W.Va. Code § 12-2-2. Thus, the Court is unpersuaded by the WVSSAC's reliance on Manchin to say that the WVSSAC is not a state agency or instrumentality.

33. What the Court finds more persuasive is the fact that less than two years after its holding in Manchin, the Supreme Court refers to the WVSSAC as a "state" commission. Hamilton v. West Virginia Secondary Schools Activities Commission, 182 W.Va. 158, 386

S.E.2d 656 (1989)(refers to the Commission as "statutorily-created agency of the government").

34. Thus, the Court finds that the WVSSAC is a statutorily-created agency or instrumentality of West Virginia state government.

35. As a general rule, awards of costs and attorney fees are not recoverable in the absence of a provision for their allowance in a statute or court rule. Nelson v. West Virginia Public Employees Ins. Bd. W. Va., 171 W.Va. 445, 300 S.E.2d 86 (1982). Citizens should not have to resort to lawsuits to protect their interests. When, however, resort to such action is necessary to cure willful disregard of the law, the government ought to bear the reasonable expense incurred by the citizen in maintaining the action. Id.

36. In this case, the WVSSAC's lack of intent to disregard a mandatory duty is insufficient to avoid an award of attorneys' fees and costs. The existence of the clearly unfair and unconstitutional forfeiture rule, and the failure of the WVSSAC to take the steps necessary to enact reasonable regulations in this area are sufficient to award to the Plaintiff his court costs and reasonable attorneys' fees. State ex rel. West Virginia Highlands Conservancy, Inc. v. West Virginia Div. of Environmental Protection, 193 W.Va. 650, 458 S.E.2d 88 (1995)(costs and attorney fees may be awarded in mandamus proceedings involving public officials, as citizens should not have to resort to lawsuits to force government officials to perform their

legally prescribed nondiscretionary duties; officials lack of intent to disregard mandatory duty is insufficient to avoid such awards, but rather, costs and attorney fees are awarded upon evidence of public official's disregard for mandatory provisions of state code).

WHEREUPON, the Court, upon consideration of the foregoing, doth herewith **ADJUDGE**, **ORDER** and **DECREE** that:

(1) Plaintiff's request to supplement the record is hereby granted;

(2) the portion of the prior Order of the Court entered on January 30, 2007, enjoining the Defendant-WVSSAC, with respect to Plaintiff O.J. Mayo, from enforcing a two-game suspension resulting from the Plaintiff being assessed two technical fouls during an interscholastic basketball contest be, and the same herewith is, **VACATED**;

(3) Rule 127-3-8.5 is struck down as unconstitutional except as it applies to restraining orders or injunctions in which a judge makes a specific finding in a final determination that the restraining order or injunction was not justified;

(4) The Plaintiff is entitled to an award of his court costs and reasonable attorneys' fees; and

(5) The Defendant WVSSAC shall take steps to amend its rules to conform to this Order, and the matter shall remain pending until the

Defendant WVSSAC reports to the Court that the appropriate amendments to its rules have occurred. At that time, this matter shall be closed and dismissed.

To all of which the various parties have noted their objections.

The clerk shall distribute copies of this order as follows:

William R. Wooton, Esq.
The Wooton Law Firm
P.O. Box 2600
Beckley, WV 25801

Michael A. Woelfel, Esq.
Matthew J. Woelfel, Esq.
801 Eighth Street
Huntington, WV 25701

Enter this order this 21st day of May, 2007.

Chief Judge Dan O'Hanlon
Sixth Judicial Circuit

ENTERED Circuit Court Criminal Order Book
No. ____ Page ____ this ____ day of

STATE OF WEST VIRGINIA
COUNTY OF CABELL,
I, ADELL CHANDLER, CLERK OF THE CIRCUIT COURT FOR THE COUNTY AND STATE AFORESAID DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE COPY FROM THE RECORDS OF SAID COURT
ENTERED ON MAY 21 2007
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS MAY 21 2007
Adell Chandler, CLERK
CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA